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In the Supreme Court of the United States

OCTOBER TERM, 1989

AUTOMOBILE CLUB OF MICHIGAN, a/k/a AAA,
and AUTO CLUB INSURANCE ASSOCIATION,
PETITIONERS,

-v-

WILLIAM J. BULLOCK,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND MICHIGAN MANUFACTURERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
PRELIMINARY STATEMENT	3
REASONS FOR GRANTING THE PETITION	5
I. Certiorari Should Be Granted To Address A State Court Decision That Contravenes Fundamental Precepts Of Federal Labor Policy	5
II. If Permitted To Stand, The Michigan Supreme Court's Decision Will Have A Serious And Far Reaching Impact On Unionized Industries	7
III. The Michigan Supreme Court Failed To Recognize That Federal Labor Law Governs A Collective Bargaining Relationship From Its Very Inception, Not Just From Its Consummation	9
CONCLUSION	12

TABLE OF AUTHORITIES

CASES: Page

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) 5

Central Metallic Casket Co., 91 NLRB 572 (1950) 10

Chemical Producers Corp., 183 NLRB 141 (1970) 11

Derrico v. Sheehan Emergency Hospital, 844 F.2d 22 (2d Cir. 1988) 8

International Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986) 10, 11

J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) 5

Local No. 438 Const. and General Laborers Union v. Curry, 371 U.S. 542, 548 (1963) 11

Maushund v. Earl C. Smith, Inc., 795 F.2d 589 (6th Cir. 1986) 8

National Metalcrafters, Division of Keystone Consolidated Industries v. McNeil, 784 F.2d 817 (7th Cir. 1986) ... 8

Newspaper Printing Corp. v. NLRB, 625 F.2d 956 (10th Cir. 1980) 10

San Diego Building Trades Council v. Garmon, 359 U.S. 236, (1959) 10

Taft Broadcasting Co., 163 NLRB 475 (1967), enforced *sub nom. American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968) 11

Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980) 6

STATUTES:

Labor Management Relations Act § 301, 29 U.S.C. § 185.. 4

National Labor Relations Act, 29 U.S.C. § 151 et seq... passim

TABLE OF AUTHORITIES — (Continued)

MISCELLANEOUS:

52nd Annual Report of The National Labor Relations Board for Fiscal Year ended September 30, 1987 6

Daily Labor Report (BNA), Aug. 11, 1988 7

Federal Mediation & Conciliation Service, Contract Expiration Notices as reported by BNA Plus, Dec. 22, 1989 7

Individual Employment Rights Manual (BNA 1989) 8

Selected U.S. Labor Statistics 1987 & 1988, BNA Plus, Dec. 22, 1989..... 7

Shepard, Heylman & Duston, *Without Just Cause* (BNA 1989) 8

The Developing Labor Law, (C. Morris, 2d Ed 1983) 10

U.S. Dept. of Labor; Bureau of Labor Statistics, "Employed wage and salary workers by age, sex, race, Hispanic origin, full or part-time status, and union affiliation 1987, 1988" as reported in *Daily Labor Report*, (BNA) Jan. 30, 1989 7

U.S. Dept. of Labor; Bureau of Labor Statistics, "Major collective bargaining agreements scheduled to expire or with wage reopenings, by year and industry" as reprinted in *Collective Bargaining Negotiations and Contracts* (BNA 1989) ... 8

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INTEREST OF THE AMICI CURIAE

The National Association of Manufacturers ("NAM") is an association of approximately 13,500 companies and subsidiaries that together produce more than eighty percent of this nation's manufactured goods and employ eighty-five percent of all manufacturing workers in the United States, many of whom are potentially affected by the issues addressed herein. NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council.

Michigan Manufacturers Association ("MMA") is a business association composed of private Michigan employers, organized and existing to study matters of general interest to its members, promote the interests of Michigan employers and of the public generally in the proper administration of laws relating to its

members, and otherwise promote the general business and economic welfare of the State of Michigan. A significant aspect of MMA's activities is representing the interests of its member-employers in employment and labor relations matters before the courts, Congress, Michigan Legislature, and State agencies. MMA appears before this Court as a representative of approximately 2,700 private employers who employ more than 1,000,000 employees, many of whom are represented by unions in collective bargaining units subject to the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), all of whom are potentially affected by the issues presently before this Court. MMA is also an employer of workers in the State of Michigan and has an interest in this case both as an employer and as a representative of employers affected by the issues decided herein. NAM and MMA represent the interests of their member-employers through various means including, as here, appearances as *amicus curiae* in cases of major concern.

As two principal voices of the manufacturing industry in the United States and Michigan, NAM and MMA have a strong interest in ensuring that the uniform and predictable body of federal labor law, under which the industry functions, not be eroded or diminished by inconsistent state court decisions on the implementation of national labor policy. Where prosecution of unionized employees' state law claims will interfere with or frustrate federal labor policy, NAM and MMA believe such claims must yield to federal preemption. The geometric increase in the number of implied contract and breach of oral promise employment lawsuits over the past decade has already created a climate of uncertainty for American businesses. This case presents a most extreme example of the type of oral promise on which implied contract claims are founded — that an employee would have a job as long as he wasn't caught stealing. Where, as here, the oral promise sought to be enforced is not only capricious, but directly at odds with lawfully imposed terms and conditions governing discharge from employment, (a "last best" offer implemented by the employer following an impasse in

bargaining) the matter is of particular concern to NAM, MMA and their members.

The Michigan Supreme Court's decision below not only frustrates a lawful economic self-help remedy, but directly contravenes the federal labor scheme established by Congress. Applicable preemption doctrines require that self-help remedies of labor disputants remain free of state regulation and controlled only by the free play of economic forces. If the mandate of federal preemption is disregarded, American employers will be subjected to unpredictable and inappropriate jury awards that will threaten their ability to compete effectively in international markets, or, in some cases, merely to survive in American markets.

The scenario in this case is far from an isolated occurrence. This particular factual situation prompted scores of virtually identical lawsuits brought by AAA employees in Michigan's state courts. Similar situations are potentially, if not actually, reflected in thousands of cases throughout the nation (see discussion, infra, pp. 7-8). Accordingly, the National Association of Manufacturers and Michigan Manufacturers Association submit this brief *amicus curiae*, with the consent of all parties, in support of the petition for a writ of certiorari in order to assist the Court in evaluating the import of the issue presented by this dispute.

PRELIMINARY STATEMENT

The question in this case is whether the NLRA preempts an implied oral contract claim raised by a member of a collective bargaining unit under state law, when the claim concerns conduct that is arguably protected or prohibited by the NLRA and undermines an economic self-help remedy that Congress intended to be unregulated. The answer to this question will determine, in effect, whether the implied oral contract, alleged to have been made before the employee cast his lot with a collective bargaining unit, may override the terms and conditions of employment that were lawfully implemented by his employer following a *bona fide* impasse in collective bargaining between his employer and his exclusive bargaining representative.

The terms of employment as asserted by Bullock in his state law action (that he would be discharged only if caught stealing) directly contradict the discharge standard (based on production levels) implemented by AAA following an impasse in bargaining with the collective bargaining unit of which Bullock was a member. Such unilateral implementation of an employer's "last best offer" is clearly comprehended by § 8 of the NLRA (see pp. 9-11 infra). AAA moved in the trial court to dismiss Bullock's claims on NLRA preemption grounds. The trial court denied the motion, but certified the question for immediate appeal because it involved "controlling questions of law as to which there is substantial ground for difference of opinion" (Petition for Certiorari, Appendix E, 71a-72a). The Michigan Court of Appeals summarily rejected the company's NLRA preemption arguments on the stated ground that no collective bargaining agreement had ever been consummated between AAA and the union. Michigan's highest court, the Michigan Supreme Court, rejected the company's NLRA preemption arguments for essentially the same reason — the absence of a consummated contract.

The inquiry formulated by the Michigan courts was whether the terms and conditions of employment, lawfully imposed by AAA following an impasse in collective bargaining with Bullock's union, took precedence over Bullock's alleged individual oral promise of employment that predated his union's certification. The Michigan courts obviously confused NLRA preemption with § 301 preemption. Labor Management Relations Act, 29 U.S.C. § 185. Because no collective bargaining agreement was effected, the Michigan Supreme Court found no federal labor preemption. However, in deeming the consummation of a collective bargaining agreement the *sine qua non* for the application of federal labor law, the Michigan courts totally disregarded the validity of terms and conditions of employment lawfully imposed by AAA as an economic self-help remedy contemplated and protected by the NLRA.

Neither Michigan court focused on the significant fact that the parties to this dispute are parties to a collective bargaining relationship — a relationship that is governed from its inception,

not just its consummation, by the National Labor Relations Act. NAM and MMA submit that Bullock's claim and the similar claims of his 50 co-workers must be addressed under federal labor law and that if they choose to challenge AAA's actions, then they must do so in the forum that has been vested with exclusive jurisdiction over disputes that arise in the context of collective bargaining relationships: the National Labor Relations Board.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO ADDRESS A STATE COURT DECISION THAT CONTRAVENES FUNDAMENTAL PRECEPTS OF FEDERAL LABOR POLICY

Prior decisions of this Court have addressed the issue of whether implied contract claims are preempted by § 301 where their resolution requires interpretation of a collective bargaining agreement. *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987). In *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), this Court touched upon the problems that arise when individual contracts conflict with the terms of a collectively bargained contract. The Court there held that an individual contract cannot take anything away from a collectively bargained agreement.[1]

The issue presently before this Court, however, is one of first impression, and as articulated further below, of enormous import. The Court's resolution of the federal preemption issue raised in this case is particularly warranted because of the large number of states that now recognize a claim for breach of an implied contract or of an oral promise of continued employment or specified employment conditions. Such claims are often based on oral promises that had been made in the past by supervisory personnel at any level of an organization, at any time in the

[1]The Michigan Courts turned this entire concept inside out by reasoning that unless a collective bargaining agreement is consummated, an individual contract takes precedence over the collective bargaining process.

individual employee's relationship with his employer. As a result of decisions such as that of the Michigan Supreme Court below, a large majority of these claims may be submitted to state court juries for resolution. This is precisely what Congress intended to prevent when it created a labor board vested with jurisdiction over disputes between employers and employees represented by a union in a collective bargaining unit.

> The purpose of the Nation's primary labor relations law is to serve the public interest by reducing interruptions in commerce caused by industrial strife. It seeks to do this by providing orderly processes for protecting and implementing the respective rights of employees, employers, and unions in their relations with one another. The overall job of the NLRB is to achieve this goal through administration, interpretation, and enforcement of the Act. 52 NLRB Ann. Rep. 3 (1987).

The fundamental policies underlying the federal labor scheme — uniformity and predictability — would be entirely frustrated if implied contract claims brought by union-represented employees are decided by the courts of 50 different states. Indeed, it should be noted that because the decision below was issued by the same court that first recognized a *Toussaint*[2] implied contract claim, it may be particularly influential on appellate courts in other states.

We submit that the time is right for the Court to address the merits of the NLRA preemption argument in this context. The Congressional mandate of uniform and effective enforcement of this nation's labor policy cannot be served by allowing a multitude of state courts to separately determine whether alleged oral or implied individual employment contracts remain effective, notwithstanding valid terms and conditions of employment arising out of the collective bargaining process. That responsibility lies with the National Labor Relations Board.

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[2] *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980)

II. IF PERMITTED TO STAND, THE MICHIGAN SUPREME COURT'S DECISION WILL HAVE A SERIOUS AND FAR REACHING IMPACT ON UNIONIZED INDUSTRIES

The impact of the decision below will extend to all employers who, following an impasse in bargaining, lawfully impose changes in terms and conditions of employment. There are at least two scenarios in which an employer would unilaterally implement a last, best offer. First, as in this case when, after union certification, negotiations toward an initial contract result in deadlock; and second, when bargaining parties are unable to reach a new agreement, even after a prior contract has expired.

Union members comprise 16.8% of the total American workforce and number over 17,002,000 (based on 1988 statistics, the last year for which official statistics have been released).[3] Between 1984 and 1988, unions organized close to 430,000 employees by winning nearly 9,000 certification elections.[4] Each new certification raises the possibility of impasse and the resulting dilemma faced by AAA in this case.

Employers whose contracts are set to expire will confront the same predicament. The Federal Mediation and Conciliation Service received 81,460 30-day contract expiration notices for fiscal year 1987, and 77,027 for fiscal year 1988.[5] During the past year alone, approximately 3.9 million workers in industry were covered by nearly 800 major collective bargaining agreements that were

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[3]U.S. Dept. of Labor, Bureau of Labor Statistics, "Employed wage and salary workers by age, sex, race, Hispanic origin, full or part-time status and union affiliation, 1987, 1988" as reported in *Daily Labor Report*, Jan. 30, 1989 at B-14.

[4]*Daily Labor Report*, Aug. 11, 1988 at B-1 and Selected U.S. Labor Statistics 1987 & 1988 as reported by BNA Plus, Dec. 22, 1989.

[5]Federal Mediation and Conciliation Services Contract Expiration Notices as reported by BNA Plus, Dec. 22, 1989. This did not include unreported expirations or collective bargaining agreements in the public sector or those covered by the Railway Labor Act.

scheduled to expire or be reopened in 1989.[6] In sum, the possibility of impasse followed by implementation of a last, best offer exists whenever contract negotiations are not immediately successful. Every other court that has ever addressed the preemption issue in this situation has held that federal labor law governs and displaces state law; see, for example, *National Metalcrafters, Division of Keystone Consolidated Industries v. McNeil*, 784 F.2d 817 (7th Cir. 1986). Moreover, anytime there is a hiatus between collective bargaining agreements, because an agreement has expired (see, for example, *Derrico v. Sheehan Emergency Hospital*, 844 F.2d 22 (2d Cir. 1988) — or because an employee has not yet come under the protection of an existing agreement — there is the possibility that state law claims like this one would be asserted, as was the case in *Maushund v. Earl C. Smith, Inc.*, 795 F.2d 589 (6th Cir. 1986). Under the Michigan court's holding below, none of those situations would be preempted by federal labor law. This would severely chill an employer's right to exercise a federally protected and federally sanctioned economic weapon.

At least 36 states have already recognized an implied contract exception to the employment at will doctrine.[7, 8] Thus, the potential for conflict between unilaterally imposed terms and conditions and alleged individual implied contracts is staggering. If the decision below stands, state courts would be inundated with implied contract allegations that should properly be pursued as unfair labor practice claims and employers would be faced with directly conflicting regulatory systems under state and federal law.

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[6]A major collective bargaining agreement is defined as an agreement covering 1000 or more workers. U.S. Dept. of Labor, Bureau of Labor Statistics, "Major collective bargaining agreements scheduled to expire or with wage reopenings, by year and industry," as reprinted in *Collective Bargaining Negotiations and Contracts* at 8:313.

[7]Shepard, Heylman & Duston, *Without Just Cause* 8-9 (BNA 1989).

[8]Only six states have explicitly refused to do so (Delaware, Florida, Indiana, Missouri, North Carolina and Tennessee). Individual Employment Rights Manual at 505:51 (BNA 1989).

NAM and MMA urge the Court to consider the broad application of the significant issue raised by this case. The employer's right to unilaterally implement changes is a well established feature of federal labor law. Unilateral change after impasse not only provides a tactical weapon for the employer, but more importantly, assures the flexibility essential to a successful commercial enterprise and a healthy economy. If an employer is unable to implement a last, best offer without having to defend hundreds of individual implied contract claims, the employer's business may be seriously jeopardized to the detriment of both the employer and its employees.

III. THE MICHIGAN SUPREME COURT FAILED TO RECOGNIZE THAT FEDERAL LABOR LAW GOVERNS A COLLECTIVE BARGAINING RELATIONSHIP FROM ITS VERY INCEPTION, NOT JUST FROM ITS CONSUMMATION

The two-fold issue presented to this Court by AAA's petition for a writ of certiorari is whether the NLRA preempts an employee's state law employment contract claim that (1) directly contradicts terms and conditions of employment lawfully implemented by the employer following an impasse in collective bargaining and (2) undermines an economic self-help remedy which Congress intended to be unregulated and controlled only by the free play of economic forces. The significance of the issue is the impact that its resolution will have on employers caught between individual contract claims which seek to bind them to a panoply of old promises and representations — made years or decades earlier by supervisors and managers — and the obligation to deal responsibly with the employees' current democratically elected bargaining representative, their union. So long as employees are collectively represented by a union, their employer's paramount obligation to bargain with the union continues. Even the existence of an impasse does not terminate the duty to bargain. Although active negotiations may be suspended, "the employer may not take action disparaging to the collective bargaining process or

amounting to a withdrawal of recognition of the union's representative status." *Central Metallic Casket Co.*, 91 NLRB 572 (1950), see also *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956 (10th Cir. 1980), as cited in *The Developing Labor Law*, Second Edition, Vol. I at 636. Just as an employer may not unilaterally implement terms and conditions for all employees that are better than those contained in its last offer, it may not implement better terms for individual employees — where doing so would disparage the collective bargaining process and undermine the status of the union as the exclusive statutory bargaining agent. Thus, if an employer were to accede to an alleged promise beneficial to an individual employee, the employer would implicitly violate the duty to bargain collectively imposed by § 8(a)(5) of the NLRA.

Surely the employee would rely upon the NLRA if his employer were to invoke a prior employment term amidst a labor dispute. Assume, for example, that Bullock was hired under a policy that he would be fired if he failed to come to work for three consecutive business days. If a union was later certified, bargained with AAA to impasse, and the union members went on strike for more than three days — prompting Bullock's discharge — clearly Bullock would seek a remedy under the NLRA.

The proscriptions and protections of the NLRA are equally available to the employer. Just as Bullock has the protected right to strike following an impasse in bargaining between his employer and his union, so does his employer have the protected right to unilaterally implement terms and conditions of employment previously proposed to the union. It is because the conduct complained of — the implementation of new terms and conditions is — protected by § 8 of the NLRA that his claim must be held preempted under *Garmon*[9] and its progeny. *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986).

As this Court held in *Davis*, where a state law claim is preempted by the NLRA under *Garmon* and subsequent cases,

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[9]San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)

"the state courts lack the very power to adjudicate the claims that trigger preemption." 476 U.S. at 398. Where a claim contains allegations that make out an arguable violation of § 8, jurisdiction over the dispute lies "within the exclusive domain of the National Labor Relations Board." *Davis*, at 390 citing *Local No. 438 Const. and General Laborers Union v. Curry*, 371 U.S. 542, 548 (1963).

In *Davis*, this Court devised a practical test for determining whether the "precondition for pre-emption" has been met: "[A] party claiming pre-emption is required to demonstrate that his case is one that the [NLRB] could legally decide in his favor." The party must also "put forth enough evidence to enable the court to find that the Board reasonably could uphold" its position. 476 U.S. at 394. As AAA explained in its Petition, Bullock's state law claims could have been presented to the NLRB as an unlawful unilateral change by AAA that was prohibited by § 8(a)(5) and § 8(d) of the NLRA and, in the event that AAA had acted improperly, he could have obtained relief. Petition for Certiorari pp. 14-21.[10] Alternatively, the NLRB could uphold AAA's unilateral change as a bargaining tactic comprehended and sanctioned by § 8(a)(5) and § 8(d). Either way it is conduct governed by the NLRA.

The parties need not have achieved an effective contract in order for Bullock or his co-workers to pursue a remedy, nor for the NLRB to address an employer's unilateral implementation of new terms and conditions following impasse. Contrary to the holding of the Michigan Supreme Court, the consummation of a collective bargaining agreement is not required for the parties' relationship to be controlled by federal labor law, a body of law that governs all aspects of the collective bargaining process, including impasse. In both *Chemical Producers Corp.*, 183 NLRB 141 (1970) and *Taft Broadcasting Co.*, 163 NLRB 475 (1967)

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[10]In 1987 the NLRB obtained $40,635,903 in reimbursement to employees illegally discharged and otherwise discriminated against. In that same year, the NLRB obtained 4,307 offers of job reinstatements with 3,206 acceptances. 52 NLRB Ann. Rep. 2 (1987).

enforced *sub nom American Federation of Television & Radio Artists v. NLRB*, 395 F.2d, 622 (D.C. Cir. 1968), a *bona fide* impasse was found when the parties reached a deadlock in their *initial negotiations*. The same rationale and policy that applied in these NLRB cases, and in those cited by Petitioner, applies to the continually arising scenarios portrayed above. Because this dispute reflects an important and recurrent issue of major significance to industry in this nation, the National Association of Manufacturers and Michigan Manufacturers Association urge the Court to resolve it at this time.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be granted.

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